

**Foo Toon Yeong & Ors v Jonah Wong Ching Hang**

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL  
NO B-02(NCVC)(W)-252-02 OF 2018

HAMID SULTAN, HANIPAH FARIKULLAH AND KAMALUDIN MD  
SAID JJCA

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10 SEPTEMBER 2019

*Civil Procedure — Action — Capacity to sue — Company suffered damages  
— Whether plaintiff as shareholder of company could bring personal claim to  
recover damages for loss in value of shares — Whether High Court judge erred in  
deciding plaintiffs were not proper party to initiate action against defendant*

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This was an appeal by the plaintiffs against the decision of the High Court who dismissed the plaintiff's claim on the ground that the plaintiff did not have locus standi to sue the defendant. The plaintiffs were seeking to recover damages which had been suffered by Façade Treatment Engineering Sdn Bhd ('FTE') from Greatlight Builder Sdn Bhd ('GLBSB'). The plaintiffs and the defendant were directors and shareholders of GLBSB. The plaintiffs were also shareholders and directors of FTE. The plaintiffs claimed that GLBSB had receive a loan from FTE but failed to repay the said loan. Out of the total loan, the plaintiffs claimed that the defendant as the director of GLBSB was liable to pay a sum based on his 15% shares in GLBSB. The defendant's defence was that: (a) there was no real debt owed to FTE by GLBSB; (b) FTE should prove that it had provided financial subsistence to GLBSB; and (c) the plaintiffs had no reasonable cause of action against the defendant and their claim was an abuse of legal process. The major issue in dispute was whether the High Court was in error in deciding that the plaintiffs were not the proper party to initiate an action against the defendant.

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**Held**, dismissing the appeal and affirming the decision of the High Court with costs:

- (1) In order to redress a wrong done to the company or to recover monies or damages as alleged to be due to the company, the action should prima facie be brought by the company itself. A shareholder cannot in substance avoid that rule by bringing a personal claim to recover damages for loss in the value of his shares merely because the company in which he was interested had suffered damage, even if the conduct of which he complained gave him personally, and not the company alone, a cause of action. This policy was to ensure that loss to the company was recovered only by the company and that the proceeds of recovery were not diverted to the shareholders to the potential prejudice of creditors. There was no

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A exception to it by which a shareholder can recover in respect of reflective loss that the company itself for any reason failed to recover. If FTE wants to recover monies owed to it by GLBSB, FTE should file the claim, not the plaintiffs (see paras 27, 29, 31 & 34).

B **[Bahasa Malaysia summary]**

Ini merupakan rayuan plaintiff terhadap keputusan Mahkamah Tinggi yang mengetepikan tuntutan plaintiff atas alasan bahawa plaintiff tidak mempunyai locus standi untuk menyaman defendan. Plaintiff memohon untuk mendapatkan ganti rugi yang dialami oleh Façade Treatment Engineering Sdn Bhd ('FTE') daripada Greatlight Builder Sdn Bhd ('GLBSB'). Plaintiff dan defendan merupakan pengarah dan pemegang saham GLBSB. Plaintiff juga merupakan pemegang saham dan pengarah FTE. Plaintiff menyatakan bahawa GLBSB telah menerima pinjaman daripada FTE akan tetapi gagal untuk membayar pinjaman tersebut. Daripada jumlah pinjaman tersebut, plaintiff menyatakan bahawa defendan sebagai pengarah GLBSB adalah bertanggungjawab untuk membayar sejumlah berdasarkan 15% sahamnya dalam GLBSB. Pembelaan defendan adalah: (a) tiada hutang sebenar yang terhutang kepada FTE kepada GLBSB; (b) FTE perlu membuktikan bahawa ianya telah memberikan bantuan kewangan kepada GLBSB; dan (c) plaintiff tidak mempunyai kausa tindakan munasabah terhadap defendan dan tindakan mereka merupakan satu penyalahgunaan proses undang-undang. Isu utama yang dipertikaikan adalah sama ada Mahkamah Tinggi terkhilaf dalam memutuskan bahawa plaintiff bukan merupakan pihak yang sesuai untuk memulakan tindakan terhadap defendan.

**Diputuskan,** mengetepikan rayuan dan mengekalkan keputusan Mahkamah Tinggi dengan kos:

- (1) Untuk membetulkan kesilapan yang dilakukan kepada syarikat, atau mendapatkan semula wang atau ganti rugi yang dikatakan perlu dibayar kepada syarikat, tindakan ini secara prima facie perlu dibawa oleh syarikat itu sendiri. Seorang pemegang saham tidak boleh mengelak peraturan dengan membawa tindakan peribadi untuk mendapatkan semula ganti rugi untuk kerugian dalam nilai sahamnya kerana syarikat yang mana dia mempunyai kepentingan telah mengalami kerugian, walaupun perlakuan yang diadu memberikannya secara peribadi, dan bukan syarikat tersebut sahaja, satu kausa tindakan. Polisi ini adalah untuk memastikan kerugian kepada syarikat diperolehi oleh syarikat dan hasil pemulihan tersebut tidak dihantar kepada pemegang saham yang boleh memprejudiskan pengkreditnya. Tiada pengecualian yang membenarkan satu pemegang saham boleh mendapatkan ganti rugi berkaitan dengan kerugian syarikat tersebut yang mana untuk apa-apa sebab gagal untuk mendapatkan kembali. Sekiranya FTE ingin mendapatkan wang yang terhutang kepadanya oleh GLBSB, FTE

sepatutnya memfailkan tuntutan dan bukannya plaintif (lihat perenggan 27, 29, 31 & 34).]

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### Notes

For cases on capacity to sue, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 56–63.

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### Cases referred to

*AIC Dotcom Sdn Bhd (suing in a representative capacity for MTEX Corp Sdn Bhd) v MTEX Corp Sdn Bhd* [2003] 4 MLJ 324, HC (refd)

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*Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417, CA (refd)

*Bumiputra-Commerce Bank Bhd v Augusto Pompeo Romei & Anor* [2014] 3 MLJ 672, CA (refd)

*Foss v Harbottle* (1843) 67 ER 189 (refd)

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*Gerber Garment Technology Inc v Lectra Systems Ltd and Another* [1997] RPC 443, CA (refd)

*Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1, HL (refd)

*Mak Siew Wei v Yeoh Eng Kong and other appeals* [2018] MLJU 1770, CA (refd)

*Menah Sulong v Lim Soo & Anor* [1983] 1 CLJ 26, FC (refd)

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*Perak Integrated Networks Services Sdn Bhd v Urban Domain Sdn Bhd (on behalf of themselves and Pins OSC & Maintenance Services Sdn Bhd through derivative action) & Anor* [2018] 4 MLJ 1, FC (refd)

*Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals* [2012] 3 MLJ 616, CA (refd)

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*Prudential Assurance Co Ltd v Newman Industries Ltd and Others (No 2)* [1982] Ch 204, CA (refd)

*RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188, FC (refd)

*See Hua Realty Bhd (suing on behalf of itself and all other shareholders of the defendant except for the first and second defendant) v KTS News Sdn Bhd & Ors* [2016] 1 MLJ 92, CA (refd)

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*Tan Poh Yee v Tan Boon Thien and other appeals* [2017] 3 MLJ 244, CA (refd)

**Appeal from:** Writ No BA-22NCVC-86–02 of 2017 (High Court, Shah Alam)

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*So Chien Hao (CH So & Assoc) for the appellant.*

*Michele Kaur (Jany Fong with her) (Sun & Michele) for the respondent.*

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**A Hanipah Farikullah JCA:**

INTRODUCTION

**B** [1] This is an appeal by the appellants against the decision of the High Court judge dated 9 January 2018 which had dismissed the appellants' claim against the respondent for a sum of RM2,456,691.05 on the ground that the appellants did not have the locus standi to sue the respondent.

**C** [2] In this present proceeding, the appellants were seeking to recover damages which had been suffered by Façade Treatment Engineering Sdn Bhd ('FTE'), from Greatlight Builder Sdn Bhd ('GLBSB').

**D** [3] The appellants and the respondent are directors and shareholders of GLBSB. Besides as directors and shareholders of GLBSB, at all material time, the appellants are also shareholders and directors FTE.

**E** [4] For convenience, the appellants will be referred to in this judgment as the plaintiffs and the respondent as the defendant.

[5] We will now turn to examine in greater detail the facts surrounding the plaintiffs' allegations in this action and the learned High Court judge's findings.

**F BACKGROUND FACTS**

**G** [6] The claim in this proceeding arose out of the unbundling of a business venture between two parties. The first party, which we will refer to as 'FTE' consists of all the plaintiffs and secondly 'GLBSB' consist of all the plaintiffs and the defendant.

**H** [7] The defendant is a minority shareholder of GLBSB, holding approximately 15% of GLBSB's shares, and the plaintiffs collectively hold the remaining 85% shares in GLBSB. Therefore, the plaintiffs effectively control GLBSB and its affairs.

**I** [8] The plaintiffs alleged that GLBSB received advances and financial assistance from FTE, where the plaintiffs are shareholders and directors. However, the defendant is neither a shareholder or director of FTE.

[9] It is not disputed between the parties that they have signed an agreement dated 4 February 2016 ('the agreement'). The salient terms and conditions of the agreement are as follows:

- (a) cl 1 — the plaintiffs and defendant acknowledged that prior to the execution of the agreement, FTE has on behalf of GLBSB incurred cost and expenses in relation to the works undertaken by GLBSB; A
- (b) cl 2 — the plaintiffs and defendant acknowledged and confirmed that as of 31 December 2015, GLBSB's outstanding to its suppliers, sub-contractors and other creditors are RM20,593,111.05. A copy of the summary for the sum of RM20,593,111.05 was attached to the agreement; B
- (c) cl 3 — the plaintiffs and defendant acknowledged that prior to the execution of the agreement, GLBSB had obtained loans from various financial institutions and charges were created in favour of those financial institutions. The list of financial institution and charges were created in favour of those financial institutions and it was stated in the agreement; C
- (d) cl 6 — in the event should GLBSB receive financial assistance from FTE to make full or part payment in respect of any outstanding sum due and payable by GLBSB to any of its creditors, which shall include but not limited to contractors, subcontractors, suppliers, financiers, government bodies and/or other debtors, the sum(s) paid by FTE on behalf of GLBSB shall be considered as loan to GLBSB from FTE. In such an event, FTE shall be entitled to impose reasonable charges to reflect charges imposed by FTE banks; D  
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- (e) cl 7 — the plaintiffs and defendant agreed that any outstanding loans received from FTE as stipulated in cl 6 shall be repayable in accordance with the shareholders' respective shareholdings in GLBSB; and F
- (f) cl 10 — the plaintiffs and defendant agreed that their respective financial contribution in relation to the works undertaken by GLBSB shall be in accordance with their respective shareholdings as GLBSB. G

*The plaintiffs' claim at the High Court*

[10] According to the plaintiffs as at 30 November 2016, GLBSB has received a total loan amounting to RM16,337,940.30 from FTE but failed to repay the said loan. Out of the total loan, the plaintiffs claim that the defendant as the director of GLBSB is liable to pay RM2,456,691.05 based on his 15% shares in GLBSB. H

[11] The plaintiffs brought this action against the defendant to seek recovery of a sum of RM2,456,691.05 due to be paid to FTE by GLBSB, pursuant to the agreement. I

[12] The defendant's defence was that:

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- (a) there is no real debt owed to FTE by GLBSB;
  - (b) FTE should prove that it has provided financial subsistence to GLBSB; and
  - (c) the plaintiffs have no reasonable cause of action against the defendant
- B**
- and their claim is an abuse of legal process.

[13] At the conclusion of the trial, having considered the authorities of of this court in *AIC Dotcom Sdn Bhd (suing in a representative capacity for MTEX Corp Sdn Bhd) v MTEX Corp Sdn Bhd* [2003] 4 MLJ 324, (see also *See Hua Realty Bhd (suing on behalf of itself and all other shareholders of the defendant except for the first and second defendant) v KTS News Sdn Bhd & Ors* [2016] 1 MLJ 92; and *Tan Poh Yee v Tan Boon Thien and other appeals* [2017] 3 MLJ 244), the learned High Court judge dismissed the plaintiffs' claim on the ground that the plaintiffs do not have the capacity to demand payment from the defendant as the recovery of the loan is between FTE and GLBSB. The learned High Court judge held that exh P1 is only an agreement between the plaintiffs and the defendant as directors and shareholders in the event GLBSB failed to pay the loan to FTE.

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[14] In gist, the learned High Court judge states as follows:

[26] The general rule is that a company has an existence that is separate and distinct from its shareholders. It is trite that both FTE and GLBSB are private companies which have separate legal existence from each other. The concept of separate legal entities is central to the corpus of company law. This is based upon the doctrine that only he who has been injured may sue. The proper party to sue for a company's debt would be the company itself. In this case, it is FTE or GLBSB if GLBSB is liable to pay FTE. In my view, it is not for the plaintiffs to step in and assume the identity of FTE or GLBSB or any other creditors to demand payment from the defendant.

**G** [15] We should also quote the following subsequent passage to this effect:

[29] Therefore if a wrong has been done to a company, then it is either FTE or GLBSB depending on the position of which who is the injured party to recover such debt. The only conclusion one can derive is, based on the above situation is that the plaintiffs cannot put forth a claim in their personal capacity as shareholders and directors for a damage allegedly suffered by FTE. If FTE has indeed the injured party that had suffered damage, then it is for FTE in its own capacity as a separate legal entity to commence action for the recovery of the debt against GLBSB and not the plaintiffs.

[16] The learned High Court judge also found that there is a total absence of evidence to show that GLBSB has failed to pay the debts as claimed by the plaintiffs and there also appears no evidence that an action was initiated by FTE to recover such debts. Therefore, unless and until GLBSB is found to be

liable to pay the debt to FTE, the defendant's responsibility under exh P1 to pay his shares of 15% of the total debt has yet to take effect.

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[17] We had after hearing the appeal dismissed the same. We now give the grounds for our decision.

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#### ISSUE

[18] The major dispute on this appeal is whether the learned High Court judge was in error in deciding that the plaintiffs are not the proper party to initiate the action against the defendant. We will now consider the arguments of the plaintiffs and the counter the arguments of the defendant.

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#### THE APPEAL

[19] Before us learned counsel for the plaintiffs submitted that the learned High Court judge erred in law and in fact to hold that the plaintiff cannot put forth a claim in their personal capacity to sue the defendant. Essentially, the arguments of the plaintiff can be summarised as follows:

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(a) relying on the case of *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188 (FC), and *Menah Sulong v Lim Soo & Anor* [1983] 1 CLJ 26, the plaintiffs submitted that the defendant has never pleaded on the issues of the plaintiffs step in and assumed the identity of either FTE or GLBSB and whether the plaintiffs have the capacity to bring this action;

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(b) the plaintiffs' action against the defendant is based on the contractual obligations between the parties as stipulated in the agreement, whereby each party shall contribute to GLBSB's debts based on their respective shareholdings in GLBSB. During cross-examination, PW1 said that the agreement is a shareholder agreement;

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(c) at cl 2 of the agreement, parties have acknowledged that the total GLBSB debts were RM20,593,111.05. At cl 7 of the agreement, parties have further agreed that '... any outstanding loan received from FTE as stipulated at Clause 6 hereof, shall be repayable by the parties hereto in accordance to their respective shareholding at Greatlight (GLBSB)'; and

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(d) the plaintiffs' claim against the defendant is based on the agreement, where the plaintiffs and the defendant were the parties who signed the agreement and the plaintiffs were merely demanding the defendant to comply with his contractual obligations as stipulated in the agreement.

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[20] For the above reasons, learned counsel for the appellant submitted that

A the learned High Court judge's finding that the appellants had no capacity to sue should be dismissed by this court.

B [21] The defendant's submission rested primarily upon this court decision in *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417 and *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals* [2012] 3 MLJ 616 which held that when a wrong is done to the company, the company itself is the only person who can sue.

C DECISION

D [22] On the pleadings, it was clear that the plaintiffs' only concern was to ensure that the sum of RM2,456,691.05 would be paid to FTE by the defendant.

E [23] In *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417 this court held that:

F We begin with the rule in *Foss v Harbottle* (1843) 67 ER 189. The rule has two limbs. *The first limb of the rule* — and the present appeal has nothing to do with its application — *is that a court will not interfere with the internal workings of a corporation upon a matter which is capable of being ratified by a majority of shareholders present and voting at a general meeting of the company.* The content of the first limb, although it derives its name from the case just cited, in truth finds its origins in the earlier decision in *Mozley v Alston* (1847) 41 ER 833. The modern restatement of the rule is to be found in the judgment of Harman LJ in *Bamford v Bamford* [1970] Ch 212; [1969] 1 All ER 969; [1969] 2 WLR 1107.

G *The second limb of the rule* is of much wider purport and is universal in its application. *It is based upon the doctrine that only he who has been injured may sue. Translated into company law, the proposition may be stated thus. If a wrong has been done to a company, then it is the company which is the proper plaintiff in an action brought to redress the injury. An individual shareholder or even a group of shareholders forming a minority on the floor of a general meeting of the company has no locus standi to bring an action to remedy a wrong done to a company.* See *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204; [1982] 1 All ER 354; [1982] 2 WLR 31.

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I The decision of the English Court of Appeal in *Wallersteiner v Moir* ... is regarded by leading textbook writers as the high-level watermark of the law and procedure governing derivative actions in the sphere of company law. Lord Denning there traced its history and scope ... :

*It is fundamental principle of our law that a company is a legal person, with its own corporate identity, separate and distinct from the directors or shareholders, and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is*

the rule in *Foss v Harbottle* (1843) 2 Hare 461. *The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only person who can sue. Likewise, when it is defrauded by insiders of a minor kind, once again the company is the only person who can sue ...*

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(See: *See Hua Realty Bhd (suing on behalf of itself and all other shareholders of the defendant except for the first and second defendant) v KTS News Sdn Bhd & Ors* [2016] 1 MLJ 92.)

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[24] Based on the above authority, we agree with the lines of argument advanced by the defendant. As a matter of principle, we cannot see how a court in this action can consider any right that the plaintiffs might claim against the defendant unless FTE is a party to the proceedings. If the court were to allow the plaintiffs' claim it would amount to allowing the plaintiffs to exercise FTE's right to sue.

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[25] In *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals* [2012] 3 MLJ 616 this court found that Ho Hup had misappropriated Bukit Jalil's cause of action against the defendants in that case. Delivering the judgment of this court Zainun Ali JCA (as she then was) held as follows:

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[173] In fact we find no particulars either in the pleadings or evidence which reflect that Ho Hup has a personal cause of action against the defendants in respect of the land and the JDA.

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[174] One can only surmise that Ho Hup's commencement of action in its personal right is related to its perceived diminution in value of its shares as a result of the JDA.

[175] However this does not entitle Ho Hup this action in its personal right.

[178] We are unable to comprehend as to how Ho Hup had suffered such that it is entitled to commence this suit in its personal right. Even if Ho Hup took the position that the entering into the JDA had caused diminution in the market value of its shares, we are unable to see how this can overcome the corporate impediment, reinforced over and over again, in various authorities, that of the 'proper Plaintiff rule'

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[179] In our view the commencement of this action by Ho Hup in its personal right is tantamount to Ho Hup misappropriating Bukit Jalil's chose in action, namely, any cause of action which Bukit Jalil has against the defendants.

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[26] We are of the view that if FTE has not taken any steps to institute the action against the defendant, there is no reason why this court should allow the plaintiffs to do so.

A [27] It is clear law that in order to redress a wrong done to the company or to recover monies or damages as alleged to be due to the company, the action should prima facie be brought by the company itself. These cardinal principles are laid down in the well-known cases of *Foss v Harbottle* (1843) 67 ER 189 and in numerous other cases (see also *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417; *Perak Integrated Networks Services Sdn Bhd v Urban Domain Sdn Bhd (on behalf of themselves and Pins OSC & Maintenance Services Sdn Bhd through derivative action) & Anor* [2018] 4 MLJ 1; *Bumiputra-Commerce Bank Bhd v Augusto Pompeo Romei & Anor* [2014] 3 MLJ 672).

D [28] Referring to *Foss v Harbottle* and *Abdul Rahim bin Aki* this court in *See Hua Realty Bhd (suing on behalf of itself and all other shareholders of the defendant except for the first and second defendant) v KTS News Sdn Bhd & Ors* [2016] 1 MLJ 92, held as follows:

[5] The rule in *Foss v Harbottle* and the exception leading to derivative action has been explained in a number of cases. Gopal Sri Ram JCA (as he then was) in *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417 had this to say:

E We begin with the rule in *Foss v Harbottle* [1843] 67 ER 189. The rule has two limbs. The first limb of the rule and the present appeal has nothing to do with the internal workings of a corporation upon a matter which is capable of being ratified by a majority of shareholders present and voting at a general meeting of the company. The content of the first limb, although it derives its name from the case just cited, in truth finds its origins in the earlier decision in *Mozley v Alston* [1847] 41 ER 833. The modern restatement of the rule is to be found in the judgment of Harman LJ in *Bamford v Bamford* [1970] Ch 212.

G The second limb of the rule is of much wider purport and is universal in its application. *It is based upon the doctrine that only he who has been injured may sue. Translated into company law, the proposition may be stated thus. If a wrong has been done to a company, then it is the company which is the proper plaintiff in an action brought to redress the injury.* An individual shareholder or even a group of shareholders forming a minority on the floor of a general meeting of the company have no locus standi to bring an action to remedy a wrong done to a company. See *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204.

I [29] As a general rule, the company is the proper claimant in an action to recover the loss that itself has suffered. A shareholder cannot in substance avoid that rule by bringing a personal claim to recover damages for loss in the value of his shares merely because the company in which he is interested has suffered damage, even if the conduct of which he complains gave him personally, and not the company alone, a cause of action.

[30] This principle is commonly traced to the English Court of Appeal

decision in *Prudential Assurance Co Ltd v Newman Industries Ltd and Others (No 2)* [1982] Ch 204 ('Prudential Assurance No 2'). This case involved, inter alia, a shareholder's claim against two directors for breach of fiduciary duty and conspiracy. The plaintiff shareholder brought the action in both its personal capacity as a shareholder and as a representative of the company. On the former count, the plaintiff pleaded that the directors had breached their duties owed to it as a shareholder by conspiring to obtain the shareholders' approval for the company to purchase certain assets at an inflated price. The first instance judge allowed the plaintiff's personal claim, with damages to be assessed. According to the judge, the directors' improper conduct caused a reduction in the company's net profits, which must have in turn caused some damage to the plaintiff by negatively affecting the quoted price of the company's shares. This decision was overturned on appeal. According to judgment of the Court of Appeal (at pp 222–223):

*In our judgment the personal claim is misconceived.* It is of course correct, as the judge found that [the directors], in advising the shareholders to support the resolution approving the agreement, owed the shareholders a duty to give such advice in good faith and not fraudulently. *But [a shareholder] cannot recover damages merely because the company in which he is interested has suffered damage.* He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because *such a 'loss' is merely a reflection of the loss suffered by the company.* The shareholder does not suffer any personal loss. His only 'loss' is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a 3 per cent shareholding. The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. *The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property.* The deceit practiced upon the plaintiff does not affect the shares; it merely enables the defendant to rob the company. A simple illustration will prove the logic of this approach. Suppose that the sole asset of a company is a cash box containing £100,000. The company has an issued share capital of 100 shares, of which 99 are held by the plaintiff. The plaintiff holds the key of the cash box. The defendant by a fraudulent misrepresentation persuades the plaintiff to part with the key. The defendant then robs the company of all its money. The effect of the fraud and the subsequent robbery, assuming that the defendant successfully flees with his plunder, is: (i) to denude the company of all its assets; and (ii) to reduce the sale value of the plaintiff's shares from a figure approaching £100,000 to nil. *There are two wrongs, the deceit practised on the plaintiff and the robbery of the company. But the deceit on the plaintiff causes the plaintiff no loss which is separate and distinct from the loss to the company. The deceit was merely a step in the robbery. The plaintiff obviously cannot recover personally some £100,000 damages in addition to the £100,000 damages recoverable by the company.* (Emphasis added.)

[31] This policy is to ensure that loss to the company is recovered only by the company and that the proceeds of recovery are not diverted to the shareholders to the potential prejudice of creditors. It similarly ensures that the process of

- A recovery is conducted only by the company and that the company's right to recover is not adversely affected by outside compromises with the shareholders to the potential prejudice of creditors. It applies to loss of benefits as a director as well as to the loss of dividends. There is no exception to it by which a shareholder can recover in respect of reflective loss that the company itself has
- B for any reason failed to recover (see *Gerber Garment Technology Inc v Lectra Systems Ltd and Another* [1997] RPC 443 at p 471).

- C [32] In *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1, the House of Lords referred *Prudential Assurance (No 2)* and explained that if the shareholder is allowed to recover in respect of such loss, then either there will be double recovery at the expense of the the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders. Neither course can be permitted. This is a matter of principle; there is no discretion involved. Justice to the defendant requires the exclusion of one claim
- D or the other; protection of the interests of the company's creditors requires that it is the company which is allowed to recover to the exclusion of the shareholder.

- E [33] In *Prudential Assurance (No 2)* case, the Court of Appeal in England rejected the notion that there is any general direction to ignore the proper plaintiffs rule. The case of *Prudential Assurance (No 2)* has been followed by this court in *Mak Siew Wei v Yeoh Eng Kong and other appeals* [2018] MLJU 1770.

- F [34] In the light of these principles, in our view, the plaintiffs are not the proper parties to sue for a debt owed by GLBSB to FTE. We agreed with the defendant's submission that if FTE wants to recover monies owed to it by GLBSB, FTE should file the claim, not the plaintiffs. In that regard, it is undisputed that the plaintiffs consider themselves to be FTE, and they assume
- G that since they collectively own FTE, they have a right to sue the defendant, which is a serious misconception.

- [35] In fact, in cross-examination, the fourth plaintiff confirmed that the monies advanced should be paid back to FTE, not the plaintiffs.

- H [36] In the present case, it is important to note that the agreement simply spells out each of the five shareholders' duties in GLBSB and their expected contribution when the time came for GLBSB to pay its dues to FTE. It is not an assignment of loan repayment obligation to the appellants and the
- I respondent, because if it were so, such an assignment will have to be signed by FTE and GLBSB too.

[37] As pointed out by learned counsel for the defendant in his written submission, to date there is no claim or demand by FTE against GLBSB nor

any claim by any financial institutions against GLBSB. In fact, there was no evidence to show that any debt has become due for payment between FTE and GLBSB or any demands. If FTE has indeed suffered any losses by reason of GLBSB's non-payment, FTE is entitled to file a claim against GLBSB to recover any such sum, but there is no such claim.

[38] The appellants produced FTE's ledgers (see pp 52–62 of appeal record (C)) to show that GLBSB owed FTE RM16,337,940.30. However, these ledgers only further amplify the defendant's argument that this said sum is owed by GLBSB to FTE, not any other party.

#### CONCLUSION

[39] For the reasons set out above, we found that the learned High Court judge did not err in her findings which warrants our appellant intervention. Therefore, unanimously, we dismissed the appeal by plaintiff (the appellant) and affirmed the learned High Court judge's decision with costs.

*Appeal dismissed and decision of High Court affirmed with costs.*

Reported by Izzat Fauzan

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